A

MAYBANK TRUSTEES BHD

v.

BOUSTEAD HOLDINGS BHD

B

COURT OF APPEAL, PUTRAJAYA
ABDULL HAMID EMBONG JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: W-02(IM)-51-2009]

C

29 SEPTEMBER 2009

COMPANY LAW: *Bonds - Redeemable convertible bonds - Rights and liabilities of issuer and bondholder - Construction of trust deed - Whether issuer's notice of redemption extinguished bondholder's right of conversion - Whether bondholder may convert notwithstanding issuance of redemption notice - Whether bondholder can convert during redemption notice period - When did conversion take place - Whether equitable doctrine of priority applicable - Whether bondholder waived right to convert after agreeing to redemption price and accepting redemption notice - Whether bondholder estopped from converting bonds to shares*

D

E

SECURITIES: *Bonds - Redeemable convertible bonds - Rights and liabilities of issuer and bondholder - Construction of trust deed - Whether issuer's notice of redemption extinguished bondholder's right of conversion - Whether bondholder may convert notwithstanding issuance of redemption notice – Whether bondholder can convert during redemption notice period - When did conversion take place - Whether equitable doctrine of priority applicable - Whether bondholder waived right to convert after agreeing to redemption price and accepting redemption notice - Whether bondholder estopped from converting bonds to shares*

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Under the terms of a trust deed, the defendant had issued certain 'redeemable convertible' bonds to the plaintiff. Provided that the bonds have not been converted by the plaintiff, they could be redeemed by the defendant either: (i) upon their seven-year maturity date; or (ii) optionally, three years after their date of issue, upon giving the plaintiff a redemption notice of not less than 30 days prior to the nominated redemption date.

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I

On 1 October 2007, the defendant issued a redemption notice to the plaintiff stipulating the redemption date as at 1 November 2007. Conversely, on 16 October 2007, the plaintiff gave notice to the defendant of its intention to convert the bonds into fully paid-up shares. On 30 October 2007, the defendant paid the entire redemption sum of RM47.740 million to the appointed paying agent. On 1 November 2007, the paying agent attempted to effect payment to the plaintiff but it was rejected by the plaintiff.

Proceedings were subsequently commenced by the plaintiff and, before the High Court, the defendant applied to strike out the plaintiff's pleadings under O. 18 r. 19(1)(b) and (d) Rules of the High Court 1980 ('RHC'), whilst the plaintiff applied for specific performance by way of summary judgment under O. 81 r. 1 RHC.

Applying the 'first in time first in right' rule of priority, the learned judge found for the defendant, holding that its redemption notice of 1 October 2007 constituted a perfectly valid exercise of its option to redeem the bonds, and that the effect of the said notice was to 'reserve' the defendant's right to redeem the bonds on the redemption date. It was held that the defendant's notice to redeem, having being issued some 15 days earlier, had 'overridden' the plaintiff's subsequent notice to convert the bonds. The plaintiff appealed.

Held (allowing the appeal)
Per Abdull Hamid Embong JCA delivering the judgment of the court:

(1) Pursuant to the optional redemption clause in the trust deed, the defendant could redeem all the bonds "which have not been converted" by the plaintiff. However, the clause required the defendant to give the plaintiff a 30-day notice prior to the redemption date – so as to provide the plaintiff with a window or interval to decide whether to convert the bonds forthwith or to accept the redemption and be paid the redemption price. (paras 7, 8, 9, 22, 23)

(2) The issuance of the defendant's redemption notice on 1 October 2007 did not have the effect of extinguishing or suspending the plaintiff's right to convert the bonds into ordinary shares. Indeed, the conversion of the bonds took

effect on 16 October 2007 when the plaintiff's conversion notice was received by the defendant's registrar. There was nothing left to be redeemed on 1 November 2007. (paras 7, 8, 9, 24, 25, 26 & 27)

(3) The 'first in time first in right' rule of priority – as applied by the learned judge – was not applicable in the instant case. This rule refers to the doctrine of competing equities under the maxim *"qui prior est tempore potior est jure"*. It is an equitable rule applied to determine the ranking of competing interests, typically in land dealings where a third party has made an overlapping claim on the same interest resulting in conflicting equities between two competing parties. (paras 19 & 20)

(4) The rights of the plaintiff and the defendant must be determined upon the construction of the relevant clauses in the trust deed itself. The express terms of the trust deed formed the basis of the agreement between the parties. The respective rights and obligations of the parties were purely contractual and equity played no part in the interpretation of the terms of the trust deed. Upon its true construction, the terms of the trust deed gave the plaintiff the right to convert the bonds at any time, unilaterally, and without the need for any prior notice; and such conversion could take place even during the defendant's 30-day redemption notice period. Such an interpretation would ensure that the reciprocal promises or obligations of the parties under the trust deed were performed in an order that was consistent with s. 53 Contracts Act 1950. (paras 21 & 28, 30 & 31)

(5) *Estoppel*-by-conduct would not operate in aid of the defendant. The plaintiff did not agree to the redemption exercise nor did it, by its conduct, mislead, influence or induce the defendant into acting in any detrimental manner. Although both the parties had ascertained the 'accreted value' and agreed on the redemption price, and the plaintiff had accepted the redemption notice, yet this did not amount to a waiver of the plaintiff's right to convert the bonds. (paras 32, 33, 34, 35, 36, 37, 38)

[Orders of High Court set aside; plaintiff's application for summary judgment allowed.]

Bahasa Malaysia *Translation Of Headnotes*

Defendan telah mengeluarkan bon 'yang boleh ditebus dan ditukar' kepada plaintif berdasarkan kepada terma-terma suatu suratikatan amanah. Sekiranya bon tidak ditukar oleh plaintif, maka defendan boleh menebusnya dengan syarat: (i) tarikh matang tujuh puluh tahunnya telah dicapai; atau (ii) sebagai suatu opsyen, tiga tahun selepas tarikh pengeluarannya, dengan memberikan plaintif tidak kurang dari 30 hari notis penebusan sebelum tarikh penebusan yang ditetapkan.

Pada 1 Oktober 2007, defendan telah memberi notis penebusan kepada plaintif sekaligus menyatakan bahawa tarikh penebusan adalah 1 November 2007. Di sebalik itu, pada 16 Oktober 2007, plaintif memberi notis kepada defendan menyatakan niatnya untuk menukar bon sepenuhnya kepada saham berbayar. Pada 30 Oktober 2007, defendan membayar keseluruhan jumlah penebusan sebanyak RM47.740 juta kepada agen pembayaran yang dilantik. Pada 1 November 2007, agen pembayaran cuba membuat bayaran kepada plaintif tetapi ditolak oleh plaintif.

Prosiding kemudian dimulakan oleh plaintif dan, di hadapan Mahkamah Tinggi, defendan memohon untuk membatalkan pliding plaintif di bawah A. 18 k. 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), sementara plaintif memohon pelaksanaan spesifik melalui penghakiman terus di bawah A. 81 k. 1 KMT.

Dengan memakai kaedah prioriti 'siapa dulu dia yang lebih berhak', yang arif hakim memihak kepada defendan, sambil menegaskan bahawa notis penebusannya yang bertarikh 1 Oktober 2007 adalah satu pelaksanaan opsyen yang sempurna bagi menebus kembali bon, dan bahawa kesan notis tersebut adalah ia akan 'menyimpan' hak defendan untuk menebus bon sehingga kepada tarikh penebusan. Diputuskan seterusnya bahawa notis defendan untuk menebus, disebabkan ianya dikeluarkan 15 hari lebih dahulu, telah 'mengatasi' notis plaintif yang berikutnya untuk menukar bon. Plaintif telah merayu.

Diputuskan (membenarkan rayuan)
Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah

(1) Berdasarkan fasal penebusan di dalam suratikatan amanah, defendan boleh menebus kesemua bon-bon "yang tidak ditukar" oleh plaintif. Bagaimanapun, fasal tersebut mengkehendaki

defendan supaya memberi notis 30 hari kepada plaintif sebelum tarikh penebusan – guna memberi plaintif peluang atau ruang untuk memutuskan sama ada untuk menukar bon dengan serta merta atau menerima penebusan dan dibayar harga penebusan.

(2) Pengeluaran notis penebusan defendan pada 1 Oktober 2007 tidak mempunyai kesan menghapus atau menggantung hak plaintif untuk menukar bon kepada saham biasa. Malah, penukaran bon mula berkuatkuasa pada 16 Oktober 2007 bilamana notis penukaran plaintif diterima oleh pendaftar defendan. Maka tiada apa lagi yang hendak ditebus pada 1 November 2007.

(3) Kaedah keutamaan 'siapa dulu dia yang lebih berhak" – seperti yang digunapakai yang arif hakim – adalah tidak terpakai kepada kes semasa. Kaedah ini merujuk kepada doktrin ekuiti bertentangan di bawah maxim *"qui prior est tempore potior est jure"*. Ia hanyalah satu kaedah equitable yang dipakai bagi menentukan taraf kepentingan-kepentingan yang bertentangan, terutama dalam urusan-urusan tanah yang melibatkan tuntutan bertindih terhadap kepentingan yang sama oleh pihak ketiga, yang sekaligus membangkitkan ekuiti-ekuiti bertentangan di antara dua pihak yang saling menentang.

(4) Hak-hak plaintif dan defendan haruslah ditentukan berdasarkan pentafsiran fasal-fasal relevan di dalam suratikatan amanah itu sendiri. Terma-terma nyata suratikatan amanah adalah merupakan tunjang perjanjian di antara pihak-pihak. Hak-hak dan obligasi masing-masing pihak adalah bersifat kontraktual dan ekuiti tidak ada peranan langsung dalam pentafsiran terma-terma suratikatan amanah tersebut. Atas pentafsirannya yang sebenar, terma-terma suratikatan amanah memberikan plaintif hak untuk menukar bon pada bila-bila masa, secara sendirian, dan tanpa perlu kepada apa-apa notis terdahulu; dan penukaran sedemikian juga boleh dibuat di dalam tempoh 30 hari notis defendan. Pentafsiran sebegini mempastikan bahawa janji-janji dan obligasi masing-masing pihak di bawah suratikatan amanah dapat dilaksanakan selaras dengan kehendak s. 53 Akta Kontrak 1950.

(5) *Estopel*-melalui-kelakuan tidak berbangkit untuk membantu defendan. Plaintif tidak bersetuju dengan pelaksanaan penebusan dan tidak juga, melalui kelakuannya, mengelirukan, mempengaruhi atau memujuk defendan supaya bertindak secara

yang memudaratkan. Walaupun kedua-dua pihak telah menetapkan 'nilai tambahan' dan bersetuju dengan harga penebusan, dan plaintif juga telah menerima notis penebusan, semua ini bagaimanapun tidak menjadi suatu waiver terhadap hak plaintif untuk menukar bon.

[Perintah-perintah Mahkamah Tinggi diketepikan; permohonan plaintif untuk penghakiman terus dibenarkan.]

Case(s) referred to:
Abigail v. Lapin [1934] AC 491 ***(refd)***
United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors [1975] 1 LNS 187 ***(refd)***
Vallipuram Sivaguru v. PCRM Palaniappa Chetty Official Administrator Of The Estate Of Gan Inn [1937] 6 MLJ 59 ***(refd)***
Zeno Ltd v. Prefabricated Construction Co (Malaya) Ltd & Anor [1967] 1 LNS 221 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 53
Rules of the High Court 1980, O. 18 rr. 19(1)(b), (d), O. 81

Other source(s) referred to:
Frank J Fabozzi, *Handbook of Fixed Income Securities,* 7th edn

For the appellant - Robert Lazar (Lai Wai Fong & Caryn Yu with him); M/s Nik Saghir & Ismail
For the respondent - Fahri Azzat; M/s Azzat & Izzat

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D8-22-1463-2007]

Reported by Gan Peng Chiang

JUDGMENT

Abdull Hamid Embong JCA:

[1] In the High Court the defendant (now respondent) had applied *vide* encl. 13 to strike out the plaintiff's (now appellant) pleading under O. 18 r. 19(1)(b), (d) Rules of the High Court 1980 (RHC) on the grounds that it was scandalous, vexatious and an abuse of the court's process.

[2] The appellant *vide* encl. 15, simultaneously applied for specific performance on a summary basis pursuant to O. 81 of the RHC.

[3] The basis of the appellant's claim was a trust deed dated 21 June 2004 under which the respondent issued a seven year redeemable convertible bonds to the bondholder, who subscribed some RM40 million worth of bonds. The bonds were taken up by Malaysia National Insurance Bhd (MNIB), and the rights are now being enforced by Mayban Trustees Bhd (the appellant). In this judgment all clauses referred to are clauses found in the trust deed.

Redemption

[4] There are two ways in which the issued bonds may be redeemed, *viz*:

(i) Upon reaching the maturity date of seven years from the issue date ie, on 19 August 2011,

(ii) By exercising the right to optional redemption before the maturity date but after three years from the issue date.

[5] (i) Under the interpretation clause of the trust deed, the redemption date is defined such:

> (i) the date fixed for redemption of such Bonds pursuant to the Redemption Notice given by the Issuer under Clause 4.2 or (ii) the Maturity Date of such Bonds, if such Bonds had not been previously redeemed, converted, purchased or cancelled in accordance with the terms herein prior to the Maturity Date;

(iii) The optional redemption price is defined such:

> the redemption sum payable by the Issuer to redeem the Bonds from the Bondholders in the event the Issuer exercises the Redemption Option, which shall be at an accreted value subject to the market price of the existing Share traded on the Bursa Malaysia being at least 130% of the Conversion Price;

[6] The respondent, as issuer of the bonds, may exercise its option to redeem pursuant to cl. 4.2. The manner by which the respondent can exercise this option is by way of giving the appellant not less than 30 days notice prior to the redemption date.

[7] Clause 4.2 of the trust deed is now reproduced for easy reference:

4.2 Redemption Option:

(a) The Issuer may exercise the Redemption Option, at anytime during the Optional Redemption Period by redeeming all (but not part of) the Bonds **which have not been converted** in the accordance with Clause 5A or Condition 4A of Schedule 2 of this Deed at the Optional Redemption Price. (our emphasis)

(b) The Issuer shall give to the Bondholders a Redemption Notice not less than thirty (30) days prior to the Redemption Date in the manner provided in Condition 8 of Schedule 2 of this Deed subject to the closing price of the Shares as traded on Bursa Malaysia for the consecutive thirty (30) days being at least 130% of the Conversion Price. The Issuer shall set out in the Redemption Notice the date, time, place and the Optional Redemption Price of the Bonds to be redeemed.

[8] Under cl. 4.2(b); the respondent is obligated to give a one-month notice to the bondholder prior to the redemption date. This 30 days interval or window period is to enable the appellant to decide whether to convert or to be paid the redemption price. Thus, during this period the position of the appellant, as the bondholder, is fluid. And the fact that a redemption notice has been given, does not extinguish the appellant's right to convert the bonds or not.

Conversion

[9] (i) Clause 5A gives the appellant the right to convert the bonds into fully paid up shares at the conversion price, which as defined in cl. 1 was RM1.95 per share. The conversion date is the date of the receipt of the Conversion Notice by the registrar of the respondent.

(ii) Upon allotment and issue of the shares the bonds so converted shall lapse and cease to be valid. (see cl. 5A2).

[10] Notices By Both Parties

(i) On 1 October 2007 the respondent issued a redemption notice stipulating the redemption date as 1 November 2007. Prior to 1 October 2007 both parties had met and agreed that the redemption sum for all the bonds subscribed by the appellants should be RM47,740,000. The appellant on the other hand, lodged a conversion notice with the registrar on 16 October

A 2007. The respondent however did not issue or allot the new shares within the ten days of that Conversion Date, as required under cl. 5A1 of the trust deed.

(ii) Clause 5A1 states that upon receipt of the Conversion
B Notice, the respondent shall within ten market days of the Conversion Date allot and issue the new ordinary shares.

[11] On 1 November 2007 the respondent instead, purported to make payment of the optional redemption price, which the
C appellant obviously rejected since it had lodged a conversion notice earlier.

[12] On 5 November 2007 the respondent issued a certificate of cancellation of the bonds, rendering them ineffective. In other words, the respondent chose to ignore the appellant's conversion
D notice.

[13] The appellant then took out an application for summary judgment, and the respondent responded by applying to strike out the claim.

E **[14]** The learned judge dismissed the appellant's application for summary judgment and allowed the respondent's application for striking out the claims.

[15] The thrust of the respondent's case was that there was no
F basis to grant specific performance to the appellant as the bonds had been earlier redeemed and thus cancelled. It was also argued that once the respondent exercised their right to redeem, the appellant's right to convert the bonds is either suspended or extinguished.

G **[16]** Learned counsel for the appellant submitted that the act of conversion took place on 16 October 2007. On that date the bonds had not yet been redeemed since the redemption date was fixed a month later, on 1 November 2007. He also stated that the
H purpose of the 30-day window period in the redemption exercise is to allow the appellant an opportunity to decide whether to convert the bonds or to allow redemption to take place. This would be guided by market sentiment.

I **[17]** The issue before the High Court and here, is thus to determine which event comes first, ie, the redemption by the respondent or the conversion by the appellant?

[18] The learned trial judge answered this question in favour of the respondent by applying the priority doctrine. In his judgment, the learned judge made the following findings:

> As the plaintiff has the right to convert and the defendant the right to redeem, the dispute can be quite easily resolved by applying the rule of priority that governs the orderly conduct of our daily lives – a *fortiori* in commercial contract involving large sums of money where decisions need to be made with speed and certainty.
>
> The rule is quite well established: first in time first in right.
>
> The defendant was "first" on the notice and the notice overrides the subsequent notice to convert given by the plaintiff. The defendant was therefore the first in time and hence the first in right.

[19] Is the doctrine of priority applicable? We think not. The doctrine applied by the learned trial judge here refers to the doctrine of competing equities under the maxim *"qui prior est tempore, potior est jure"* (ie, priority is determined by the order of the creation of interests.) It is an equitable rule applied to determine the ranking of competing interests. Its application may be seen from some authorities on land dealings where a third party is involved in making an overlapping claim on the same interest resulting in conflicting equities between two competing parties. An instance of such conflict arises in cases of land dealings where two rival parties claim their equity under the same title as happened in the cases of *Vallipuram Sivaguru v. PCRM Palaniappa Chetty Official Administrator Of The Estate Of Gan Inn* [1937] 6 MLJ 59 and *Zeno Ltd v. Prefabricated Construction Company (Malaya) Ltd & Anor* [1967] 1 LNS 221. In both cases there arose the question of who had a better equity in the land between a lienholder and a transferee of the same land title.

[20] In the case of *United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors* [1975] 1 LNS 187, the Federal Court applied the doctrine by citing the decision of the Privy Council in *Abigail v. Lapin* [1934] AC 491, and referred to a paragraph from an Australian case stating:

> In the case of a contest between two equitable claimants, the first in time, all other things being equal, is entitled to priority.

[21] In our view, the rights of the parties in this case must be determined on the construction of the relevant clauses in the trust deed itself, in particular those express terms which we had adverted to earlier in this judgment. These terms form the basis of their agreement as regards the bonds. We thus find that the equitable doctrine of priority, not to be applicable. This is purely a case of the parties respective rights and obligations pursuant to their contract. Equity, in our view, plays no part in interpreting those relevant clauses.

[22] In our view, the giving of an early notice for redemption does not take immediate effect but must, according to cl. 4.2 of the trust deed, be deferred until the lapse of a 30-day window period. During this window period, the closing price of the shares for 30 consecutive days must be at least 130% of the conversion price. The conversion price was RM1.95 and so, the 130% works out to at least RM2.53.

[23] The appellant during this 30-day window period, would then be able to decide whether to convert the bonds into ordinary shares (which was what it did) prior to the expiry of that 30-day window period or to receive the optional redemption price at the expiry of that period. In its notice of redemption the respondent had informed the appellant that the redemption date was fixed for 1 November 2007 ie, two weeks after the Conversion Date.

[24] It is also our finding that the redemption notice had not affected or extinguished the right of the appellant to convert their bonds under Schedule 2 of the trust deed. In fact under cl. 5A1 the respondent is obliged within ten market days upon receipt of the Conversion Notice to allot and issue new ordinary shares to the appellant. Furthermore, the trust deed makes no mention of the extinguishment of the appellant's right to convert, upon receiving the notice to redeem. Conversion thus, may take place at any time, even within the 30-day interval period.

[25] Since the conversion took place on 16 October 2007 ie, the date the appellant's notice to convert was received by the registrar, it should then have been allotted and issued with the new ordinary shares within ten market days. Thus by 1 November 2007, ie, the effective redemption date, there was nothing left to be redeemed since the bonds are deemed converted into new ordinary shares.

[26] We thus agree with the stand taken by the appellant that their right to conversion had crystallized first.

[27] Under the terms of the trust deed, each party may exercise either options to redeem or to convert unilaterally and without the need for prior consent from the other party. But, to accede to the view of the respondent that once the respondent exercised its right to redeem, the appellant's right to convert is "suspended or extinguished" would mean that the rationale of having a 30-day window period and the need to have a minimum threshold value (at 130% of the Conversion Price of RM1.95) would have no purpose or effect at all. Why then have these meaningless terms inserted in the trust deed?

[28] It would also mean that the appellant's hand would be bound by the mere issue of the respondent's optional notice of redemption whereas the trust deed gives the appellant the right to convert the bonds at any time, unilaterally and without any prior notice.

Estoppel

[29] The respondent also raised the issue of *estoppel* stating that the appellant had in, their meeting prior to the issuance of the redemption notice, agreed to the Optional Redemption Price (amounting to RM47,740,000). It was not disputed that in that meeting the appellant was represented by one Siti Nita Zuhra Mohd Nazri. It was submitted by learned counsel of the respondent that the business efficacy must be given to that agreement by the representative of the appellant, otherwise it would promote chaos.

[30] Firstly we say that to hold that the appellant's right to convert the bonds had crystallized first does not flout business common sense. Nor does it bring chaos to this or any similar transaction. In our view, the approach we have taken is but to give effect to the order of performance, of the parties obligations under the trust deed, which is construed in accordance with s. 53 of the Contracts Act 1950, which states:

> where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

[31] The business efficacy here, we think, is that it makes more sense why the right to convert should remain unaffected during the 30-day window period before the redemption becomes effective. That this choice for a conversion remains open to the appellant even during the window period can be seen in this commentary on "Investors Option" found in the seventh Edition of the *Handbook of Fixed Income Securities* by Frank J. Fabozzi, which says this:

> Conversion Option
>
> When a convert is redeemed by the issuer, it loses the conversion privilege on the last day of the redemption notice period, which is generally 15 to 30 calendar days following the redemption notice, with 30 days the norm. Most often redemption is intended to force the convert into equity. For this to occur, the convert should be in-the-money when the investor turns in the bond. And this raises the question of when during the 30-day period should the investor tender the bond for conversion. Following the redemption notice, if the stock price falls below the effective per share redemption price, the investor can choose to receive the redemption price. Thus the redemption notice triggers a put, with maturity equal to the number of days in the redemption notice period, during which time the investor has the right to tender the convert and receive the redemption price. As is well known, all long positions in American options have nonnegative value. Consequently, under normal circumstances, they should not be exercised prematurely. The investor should wait to exercise either option until the moment before the expiration of the redemption period.

[32] As regards the *estoppel* by conduct of the appellant, we find that there is no merit in this submission. We are satisfied that there was neither any intention on the part of the appellant to agree to the redemption exercise, nor to influence or induce the respondent to act in any particular manner.

[33] Learned counsel for the respondent in his submission had referred to Siti Nita Zuhra's affidavit in reply for the appellant, in particular to para 21.3. The whole of that said para 21 is now reproduced to appreciate the proper context of that reply in the face of the respondent's assertion that the appellant's right to conversion is extinguished or suspended in view of Siti Nita Zuhra's agreement to the redemption notice.

[34] Paragraph 21 of the said affidavit states: A

21. With reference to paragraphs 8 to 8.2 of the Defendant's Affidavit, I disagree with the inference drawn by the Defendant as set out therein. In reply, I state as follows:

21.1 Under clause 4.2C of the Trust Deed, on the Redemption Date, in this case 1st November 2007, the Optional Redemption Price together with any outstanding Coupons and other payments due under the Trust Deed shall be paid to the Bondholders in accordance with Depository Procedures. B C

21.2 Under 1.1 of the Trust Deed, the Optional Redemption Price shall be 'at an accreted value subject to the market price of the existing shares traded on the Bursa Malaysia being at least 130% of the Conversion Price'. The Trust Deed does not provide for the method to ascertain the 'accreted value' referred to in the Trust Deed. D

21.3 In the circumstances, it was necessary for MNIB and the Defendant to ascertain and agree on the 'accreted value' and consequently, the Optional Redemption Price. Since the documentation does not provide a formula for calculating the quantum, it was necessary for me to then discuss with the Defendant's representative and calculate and to arrive at what would be a mutually acceptable Optional Redemption Price. That was all that was done. Certainly there was no waiver of the right of MNIB to convert the RC Bonds. E F

21.4 MNIB and the Defendant did ascertain and agree on the accreted value and consequently, the Optional Redemption Price. The Optional Redemption Price was calculated based on a yield to market rate of 3.90% and coupon rate of 4.5%. G

21.5 Thus, my acknowledgement and agreement to the Redemption Notice is limited to what has been set out above. It is not a waiver of the Plaintiff's right to convert the RC Bonds. H

It is clear from paragraphs 21.3 and 21.5 above that the acceptance of the Redemption Notice is not meant to be a waiver on the part of the Appellant.

I

[35] Furthermore, and as already stated the trust deed itself does not mention the need for any consent for a redemption notice to be issued. It may be unilaterally exercised by the respondent. Nor is there any term in it to say that, even if there was an agreement for its issue, that the appellant's right to convert the bonds is extinguished.

[36] The evidence does not show that the respondent had been misled or put into a position of detriment by the conduct of the appellant, for the doctrine of *estoppels* to arise.

[37] Learned counsel in his concluding speech to us said this:

> The Issuer (Respondent) here in effect is borrowing money and agrees to pay a fixed rate of interest for a 7 year period. The Issuer only has the right to opt for early redemption after 3 years. The Issuer cannot compel the Bondholder (the Appellant) to take up the shares. By exercising early redemption the Issuer deprives the Bondholder of further interest payments. However during the window period (ie, the 30-day interval) the Closing Price of the shares must be at least at the Minimum Threshold Share Value that is 130% of the Conversion Price. (The Conversion Price in this case was RM1.95 so 130% will be at least RM2.535). This requirement is to enable the Issuer (by way of the issuance of the Redemption Notice) to force the Bondholder to decide within the window period (who is potentially going to be deprived of future interest payments) whether to convert the bonds into ordinary shares prior to the expiry of the window period or to receive the Optional Redemption Price at the expiry of the window period.

[38] We agree and adopt the same as our conclusion.

[39] For these reasons, we allowed this appeal with costs here and below. We also allowed the appellant's application for summary judgment at encl. 15 and for damages to be assessed by the registrar. The order of the High Court dated 24 November 2008 is set aside.